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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**TIFFANY ANN CAHILL,
Individually and On Behalf of All
Others Similarly Situated,**

Plaintiff,

v.

**PERFORMANT RECOVERY,
INC.,**

Defendant.

Case No.: '16CV2587 DMS MDD

CLASS ACTION

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF PURSUANT
TO THE TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. § 227,
ET SEQ.**

JURY TRIAL DEMANDED

INTRODUCTION

1. Plaintiff TIFFANY ANN CAHILL ("Plaintiff") brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of Defendant

PERFORMANT RECOVERY, INC. (“Defendant”) in negligently and/or intentionally contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to herself and her own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.

2. The TCPA was designed to prevent calls like the ones described within this complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

3. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors and telemarketers may call them, and made specific findings that “[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward this end, Congress found that:

[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

Id. at § 12; *see also Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL 3292838, at* 4 (N.D. Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s purpose).

4. Congress also specifically found that “the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. *See also, Mims*,

132 S. Ct. at 744.

JURISDICTION AND VENUE

5. This Court has federal question jurisdiction because this case arises out of violation of federal law. 47 U.S.C. §227(b).

6. Venue is proper in the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1391 for the following reasons: (i) Plaintiff resides in the City of San Diego, County of San Diego, State of California which is within this judicial district; (ii) the conduct complained of herein occurred within this judicial district; and, (iii) many of the acts and transactions giving rise to this action occurred in this district because Defendant:

- (a) is authorized to conduct business in this district and has intentionally availed itself of the laws and markets within this district;
- (b) does substantial business within this district;
- (c) is subject to personal jurisdiction in this district because it has availed itself of the laws and markets within this district; and,
- (d) the harm to Plaintiff occurred within this district.

PARTIES

7. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the City of San Diego, County of San Diego, State of California. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (39).

8. Plaintiff is informed and believes, and thereon alleges, that Defendant is a California corporation with its principal place of business at 333 North Canyons Pkwy., Suite 100, Livermore, CA 94551. Defendant is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (39).

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1 9. Plaintiff alleges that at all times relevant herein Defendant conducted
2 business in the State of California and in the County of San Diego, and
3 within this judicial district.

4 **FACTUAL ALLEGATIONS**

5 10. Plaintiff alleges that at all times relevant herein Defendant conducted
6 business in the State of California, County of San Diego, and within this
7 judicial district.

8 11. At no time did Plaintiff ever enter into a business relationship with
9 Defendant.

10 12. In or around June 2016, Defendant placed at least five (5) telephone calls to
11 Plaintiff's cellular telephone number ending in "2493" via an "automatic
12 telephone dialing system" ("ATDS"), as defined by 47 U.S.C. § 227(a)(1).

13 13. These calls are believed to be for debt collection purposes, and were from
14 telephone number (619) 610-0046.

15 14. The ATDS used by Defendant has the capacity to store or produce telephone
16 numbers to be called, using a random or sequential number generator.

17 15. The ATDS used by Defendant also has the capacity to, and does, dial
18 telephone numbers stored as a list or in a database without human
19 intervention.

20 16. Upon information and belief, Defendant obtained Plaintiff's cellular
21 telephone number from someone other than Plaintiff.

22 17. Defendant's calls were placed to a telephone number assigned to a cellular
23 telephone service for which Plaintiff incurs a charge for incoming calls
24 pursuant to 47 U.S.C. § 227(b)(1).

25 18. Defendant's calls constitute calls that were not for emergency purposes, as
26 defined by 47 U.S.C. § 227(b)(1)(A)(i).

19. Plaintiff did not provide Defendant or its agent(s) prior express consent to receive calls to her cellular telephone, including by means of ATDS, pursuant to 47 U.S.C. § 227(b)(1)(A).

20. These telephone calls by Defendant, or its agent(s), violated 47 U.S.C. § 227(b)(1).

21. Through Defendant's aforementioned conduct, Plaintiff suffered an invasion of a legally protected interest in privacy, which is specifically addressed and protected by the TCPA.

22. Plaintiff was personally affected by Defendant's aforementioned conduct because Plaintiff was frustrated and distressed that, Defendant interrupted Plaintiff with calls using an ATDS.

23. Defendants' call forced Plaintiff and other similarly situated class members to live without the utility of their cellular phones by occupying their cellular telephone with one or more unwanted calls, causing a nuisance, lost time, and reduced battery life.

24. Defendant's calls to Plaintiff's cellular telephone number were unsolicited by Plaintiff and were unwanted by Plaintiff.

25. Plaintiff is informed and believes and here upon alleges, that these calls were made by Defendant and/or Defendant's agent(s), with Defendant's permission, knowledge, control and for Defendant's benefit.

26. Through the aforementioned conduct, Defendant has violated 47 U.S.C. § 227, *et seq.*

CLASS ACTION ALLEGATIONS

27. Plaintiff brings this action on behalf of herself and on behalf of all others similarly situated (the "Class").

28. Plaintiff represents, and is a member of the Class, consisting of:

1 All persons within the United States who received any
2 telephone call from Defendant or its agent/s and/or
3 employee/s, not sent for emergency purposes, to said
4 person's cellular telephone made through the use of any
5 automatic telephone dialing system and/or with an
6 artificial or prerecorded message within the four years
7 prior to the filing of the Complaint.

8 29. Defendant and its employees or agents are excluded from the Class. Plaintiff
9 does not know the number of members in the Class, but believes the Class
10 members number in the thousands, if not more. Thus, this matter should be
11 certified as a Class action to assist in the expeditious litigation of this matter.

12 30. Plaintiff and members of the Class were harmed by the acts of Defendant in
13 at least the following ways: Defendant, either directly or through its agents,
14 illegally contacted Plaintiff and the Class members via their cellular
15 telephones by using an ATDS, thereby causing Plaintiff and the Class
16 members to incur certain cellular telephone charges or reduce cellular
17 telephone time for which Plaintiff and the Class members previously paid,
18 and invading the privacy of said Plaintiff and the Class members. Plaintiff
19 and the Class members were damaged thereby.

20 31. This suit seeks only damages and injunctive relief for recovery of economic
21 injury on behalf of the Class, and it expressly is not intended to request any
22 recovery for personal injury and claims related thereto. Plaintiff reserves the
23 right to expand the Class definition to seek recovery on behalf of additional
24 persons as warranted as facts are learned in further investigation and
25 discovery.

26 32. The joinder of the Class members is impractical and the disposition of their
27 claims in the Class action will provide substantial benefits both to the parties
28 and to the court. The Class can be identified through Defendant's records or
Defendant's agents' records.

33. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. The questions of law and fact to the Class predominate over questions which may affect individual Class members, including the following:

- a) Whether, within the four years prior to the filing of this Complaint, Defendant or its agents initiated any telephonic communications to the Class (other than a message made for emergency purposes or made with the prior express consent of the called party) using any automatic dialing system to any telephone number assigned to a cellular phone service;
- b) Whether Defendant obtain Plaintiff's cellular telephone number from someone other than Plaintiff;
- c) Whether Defendant can meet its burden of showing Defendant obtained prior express consent;
- d) Whether Defendant's conduct was knowing and/or willful;
- e) Whether Plaintiff and the Class members were damaged thereby, and the extent of damages for such violation; and
- f) Whether Defendant and its agents should be enjoined from engaging in such conduct in the future.

34. As a person that received at least one telephonic communication from Defendant's ATDS without Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of the Class. Plaintiff will fairly and adequately represent and protect the interests of the Class in that Plaintiff has no interests antagonistic to any member of the Class.

35. Plaintiff and the members of the Class have all suffered irreparable harm as a result of the Defendant's unlawful and wrongful conduct. Absent a class action, the Class will continue to face the potential for irreparable harm. In addition, these violations of law will be allowed to proceed without remedy

1 and Defendant will likely continue such illegal conduct. Because of the size
2 of the individual Class member's claims, few, if any, Class members could
3 afford to seek legal redress for the wrongs complained of herein.

4 36. Plaintiff has retained counsel experienced in handling class action claims and
5 claims involving violations of the Telephone Consumer Protection Act.

6 37. A class action is a superior method for the fair and efficient adjudication of
7 this controversy. Class-wide damages are essential to induce Defendant to
8 comply with federal and California law. The interest of Class members in
9 individually controlling the prosecution of separate claims against Defendant
10 is small because the maximum statutory damages in an individual action for
11 violation of privacy are minimal. Management of these claims is likely to
12 present significantly fewer difficulties than those presented in many class
13 claims.

14 38. Defendant has acted on grounds generally applicable to the Class, thereby
15 making appropriate final injunctive relief and corresponding declaratory
16 relief with respect to the Class as a whole.

17 FIRST CAUSE OF ACTION

18 NEGLIGENT VIOLATIONS OF THE TCPA

19 47 U.S.C. § 227 ET SEQ.

20 39. Plaintiff incorporates by reference all of the above paragraphs of this
21 Complaint as though fully stated herein.

22 40. The foregoing acts and omissions of Defendant constitute numerous and
23 multiple negligent violations of the TCPA, including but not limited to each
24 and every one of the above-cited provisions of 47 U.S.C. § 227, *et seq.*

25 41. As a result of Defendant's negligent violations of 47 U.S.C. § 227, *et seq.*,
26 Plaintiff and the Class are entitled to an award of \$500.00 in statutory
27 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
28

42. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

SECOND CAUSE OF ACTION

KNOWING AND/OR WILLFUL VIOLATIONS OF THE TCPA

47 U.S.C. § 227 ET SEQ.

43. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

44. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227, *et seq.*

45. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227, *et seq.*, Plaintiff and the Class are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

46. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the Class Members pray for judgment against Defendant as follows:

- Certify the Class as requested herein;
- Appoint Plaintiff to serve as the Class Representative in this matter;
- Appoint Plaintiff's Counsel as Class Counsel in this matter;
- Providing such further relief as may be just and proper.

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In addition, Plaintiff and the Class Members pray for further judgment as follows:

**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

**SECOND CAUSE OF ACTION FOR KNOWING/WILLFUL VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class member \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

TRIAL BY JURY

47. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: October 17, 2016

Respectfully submitted,

HYDE & SWIGART

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